

PEDRO BAY CORP.

IBLA 84-690, 84-702,
85-12

Decided September 24, 1985

Consolidated appeal from decisions of the Alaska State Office, Bureau of Land Management, approving Native allotment applications A 62760, AA 6055, and AA 286.

Set aside and remanded. Contest ordered.

1. Alaska: Native Allotments

Native allotment applications which are protested by an Alaskan Native corporation are not legislatively approved by the Alaska National Interest Lands Conservation Act, sec. 905(a)(1). Such applications must be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).

2. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Indians: Alaska Natives: Generally

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

3. Alaska: Native Allotments -- Contests and Protests: Generally -- Rules of Practice: Government Contests

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

APPEARANCES: Robert H. Wagstaff, Esq., Anchorage, Alaska, for appellant; Colleen DuFour, Esq., Anchorage, Alaska, for respondents.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Pedro Bay Corporation (Pedro Bay), an Alaska Native village corporation, has appealed from three decisions of the Alaska State Office, Bureau of Land Management (BLM). On May 15, 1984, BLM approved Native allotment application AA 6055. Two other decisions, on May 15 and May 17, 1984, held Native allotment applications AA 286 and AA 62760, respectively, for approval. In each decision, Pedro Bay selection AA 6690-J and State selection AA 21632 were rejected to the extent they conflicted with the specific Native allotments. The Bureau of Indian Affairs had filed three applications in conflict with Pedro Bay's claims for unsurveyed land in T. 4 S., R. 27 W., Seward Meridian, on the following dates: for Elsie L. Brown, AA 6055, on October 6, 1970; for John B. Kohler, A 62760, on July 1, 1965; and for Leona Davidson, AA 286, on September 20, 1966. Brown claimed use and occupancy from July 1968, Davidson and Kohler from August 1963. BLM conducted field examinations, then rejected Brown's application for lack of proof of use and occupancy. However, BLM later reconsidered this decision, and reinstated Brown's Native application pending a further determination. BLM then notified all three Native applicants to submit further evidence of use and occupancy, particularly in the form of witness statements. Each of the three applicants submitted statements using forms provided by the Bureau of Indian Affairs.

Meantime, on October 17, 1974, Pedro Bay had filed village selection application AA 6690-J, pursuant to section 12(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611(a) (1982). On November 14, 1978, the State of Alaska filed State selection AA 21632. Both selections included each of the three individual Native allotment parcels at issue here. On August 8, 1980, by interim conveyance 359, and pursuant to sections 14(a) and 22(j) of ANCSA, 43 U.S.C. §§ 1613(a) and 1621(j), BLM conveyed to Pedro Bay lands in secs. 28, 29, 30, 31, and 36, T. 4 S., R. 27 W., Seward Meridian, specifically excluding, however, the land embraced in these three individual Native allotment applications.

On May 18, 1981, Pedro Bay filed protests with BLM objecting to the exclusion of the land in the Native allotment applications, pursuant to subsection 905(a)(5)(A) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(A) (1982). Pedro Bay asserted the allotment applicants were not entitled to the land described in their applications and that the lands were withdrawn for selection by Pedro Bay pursuant to ANCSA, 43 U.S.C. §§ 1601-1628 (1982). BLM considered the protest in adjudicating the allotment applications. However, "[b]ased upon adjudication of [each] application," BLM determined the individual applicants had satisfied the use and occupancy requirements of the Alaska Native Allotment Act of 1906 (Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed subject to pending applications, 43 U.S.C. § 1617 (1982). The three applications for individual allotment are not related, but are consolidated here for purposes of decision because of the similarity of the issues presented.

Elsie L. Brown's application AA 6055, listed fishing, hunting, and berrypicking as the basis for her claim of approximately 160 acres of

unsurveyed land in secs. 35 and 36, T. 4 S., R. 27 W., Seward Meridian, from 1968 to the "present." The application was filed on October 6, 1970, only 2 years after her claimed occupancy commenced. Brown's application claimed seasonal use from July through September of each year, and she claimed no improvements.

A BLM field report, dated October 27, 1972, and made following an aerial and ground examination of the Brown claim on June 15, 1971, states that neither examination revealed any evidence of use or occupancy. The BLM field examiners also interviewed area residents. One witness, from nearby Pile Bay, reported to the examiners that Brown and others once landed at Pile Bay in a floatplane. Pedro Bay village council members and residents reported Brown had not used the land or occupied it. The examiners found no corners, markings, or postings on the claim. The examiners recommended rejection of the allotment application. The report contains a statement signed by nine persons claiming to have personal knowledge of the usage made of this land which states Brown has not used or occupied the land claimed.

Consequently, as previously stated, on February 2, 1973, BLM rejected Brown's allotment application for lack of evidence showing her use and occupancy of the claimed land for 5 years. On June 18, 1981, however, BLM informed Brown her application was reinstated effective September 5, 1979. The apparent basis for reinstatement was BLM's belief that Brown had not had sufficient opportunity to show use and occupancy. Responding to this change of circumstance on April 12, 1984, Brown filed three affidavits from her daughter, brother-in-law, and a friend which indicate the affiants had seen Brown on the land, and that Brown had used the land each fall for berrypicking, fishing, and food gathering. The affiants disagreed concerning the initiation of her claimed use of the allotment; 1968, 1969, and 1965 were variously given as the beginning date for occupancy.

Leona Davidson's allotment application AA 286, dated September 20, 1966, was corrected on November 18, 1966, and amended on June 9, 1971, to claim approximately 160 acres. Her claimed allotment lies on the shore of Lonesome Bay, Lake Iliamna. Her original application claimed occupancy since September 15, 1966. Her 1971 allotment application claimed seasonal use from 1963 through 1971 in August through October based upon fishing, hunting, and berrypicking uses and erection of a temporary shelter, fish racks, and a clearing for a cabin site.

A field examination on May 25, 1979, found no evidence of Davidson's claimed uses or improvements, although the resources and raw materials necessary to support the uses were present on the allotment. The field examiner reported he located and posted the parcel. The report also includes an account of a telephone interview with Davidson, during which she reportedly stated: "I have not used the parcel, but I was there two or three years ago." The BLM examiner also interviewed residents of the area concerning Davidson's claimed occupancy. He describes his investigation in the field report:

It is also noteworthy that no one in the village (including council member Edna Shugak) had any knowledge of the applicant or the location of her allotment. This became apparent when Mrs. Davidson was not available for the 1979 examination and she was informed that if she or someone she knew could not go with

the examiner a representative from the Pedro Bay village council would accompany him.

(Field Report at 4.) The report concluded Davidson had not fulfilled the requirements of the Allotment Act. However, BLM did not reject her application.

Instead, on July 22, 1983, BLM notified Davidson she could submit additional proofs in support of her claim. In response, Davidson submitted affidavits by three friends indicating that since 1963 she had used the land from August to October of each year, and that she maintained a campsite and firepit on her claim. A fourth affiant indicated Davidson began occupancy in 1966. All four agreed she had picked berries, gathered wood, and fished in the spring, and had fished in the summer. One affidavit describes berrypicking and wood gathering activity by Davidson in the summer, while another includes food gathering in the spring. Two affiants state they had personally seen her use the land, while one had not.

Davidson supplemented the record with two personal affidavits on appeal. She states that she and her brother, allotment applicant John B. Kohler, staked the land during a brief visit in 1963, and that they camped, fished, and began clearing both parcels during a week-long visit in 1965. She refers to other occasional visits and says she and her brother visited both claims often. She also disputes the field examiner's account of their telephone conversation as found in the record. She points out that evidence of use can disappear quickly, particularly on the beach of Lake Iliamna. She states she is not from Pedro Bay and never had occasion to go there, so that no one from Pedro Bay had occasion to be acquainted with her.

John B. Kohler's Native allotment application, filed July 1, 1965, and amended June 17, 1971, is for approximately 160 acres based upon a claim of occupancy from 1963 to 1971; claimed uses include hunting, fishing, and wood-cutting annually during the period from August to September. Improvements on the allotment were stated to be fish racks and a clearing for a cabin site. On May 17, 1979, BLM informed Kohler of a planned field examination. Kohler indicated he could not attend, but that someone from the Pedro Bay Village Council should go in his place. The field examiner, however, could not find anyone on the council or in the village who knew either Kohler or the location of his allotment, so as a consequence the allotment was not examined in 1979. Another field examination was scheduled in May 1980. Kohler again failed to attend the examination. In an inspection on May 25, 1980, the field examiner found no evidence on the claimed land of either the activities or the improvements Kohler claimed on his application. From his field observation the examiner concluded "I cannot conclude whether the applicant has complied with the [Allotment] Act * * *." (Examiner's Report at 4 (emphasis in original)). BLM did not, however, reject the application.

In response to a December 15, 1983, BLM request for additional evidence in the form of witness statements, Kohler filed four affidavits, one by his sister, applicant Leona Davidson, one by an adjacent allotment claimant, one by a friend, and one by another relative. Of the four affiants, only one had seen the applicant use the land; the claimant's sister (according to her affidavit) and the adjoining allotment applicant had not. Three affiants

named 1963 as the first year of Kohler's occupancy; Davidson specified 1966. All agreed Kohler had been on the allotment for berrypicking, fishing, and wood gathering in the summer months.

On appeal, Kohler also has supplied supplemental affidavits, including one from a pilot who took him and Davidson to Lonesome Bay five or six times, usually on a weekend, during the years 1966 through 1976. The pilot indicates Davidson kept a cache and a tent on her allotment. However, he did not see the Kohler allotment.

Pedro Bay now contends these three allotment applicants do not fulfill the statutory requirements of the 1906 Allotment Act, because they have failed to submit sufficient reliable evidence to establish their use and occupancy of the individual allotments sought. The three individual allotment applicants argue Pedro Bay has the burden of showing how the BLM decisions approving the allotments are in error. The applicants contend Pedro Bay has not substantiated its allegations with evidence and has consequently not met its evidentiary burden. By order dated October 26, 1984, the Board consolidated these three appeals for decision. In that order also, the Board invited the parties to comment upon the relevance to issues in this appeal of the decision in State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984). In response to the Board's order, Pedro Bay argues the Department lacks the jurisdiction to adjudicate the allotments because "title to at least two of the parcels in question has been conveyed to Pedro Bay by interim conveyance" (Response at 2). The Thorson opinion, however, is clearly without precedential value in these cases, since here, unlike the Thorson situation and contrary to Pedro Bay's assertion, there has not yet been a conveyance of the lands which are the subject of these appeals. The land claimed by Pedro Bay, the State, and each native allotment applicant has yet to be finally adjudicated and disposed of by the Department.

[1, 2] These three allotment applications were filed pursuant to the 1906 allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970). Section 18(a) of ANCSA, 43 U.S.C. § 1617 (1982), repealed the Allotment Act, but preserved Native allotment applications pending on December 18, 1971. Section 905 of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), approved Native allotment applications filed pursuant to the Allotment Act, which were pending before the Department on or before December 18, 1971, and which described land that was unreserved on December 13, 1968, subject to valid existing rights except where otherwise provided by other subsections of that section, effective 180 days after the Act's passage. However, subsection 905(a)(5)(A) of ANILCA, 43 U.S.C. § 1634(a)(5)(A) (1982), required that a Native allotment application be adjudicated pursuant to the Allotment Act, where a Native corporation had filed a protest against the allotment claim and the land within the claim was withdrawn for selection by the Native corporation under ANCSA. Because Pedro Bay filed timely protests against these allotment applications, BLM was required to adjudicate them; the allotments were not legislatively approved. See State of Alaska, 85 IBLA 196 (1985); Pedro Bay Corp., 78 IBLA 196 (1984). Therefore, these three allotment applications must be adjudicated according to the criteria of the Allotment Act.

The 1906 Allotment Act authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" vacant,

unappropriated, and unreserved nonmineral land in Alaska not to exceed 160 acres to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or is 21 years of age. See 43 U.S.C. § 270-1 (1970). An allotment cannot be granted under the Allotment Act until the allotment applicant has established substantially continuous use and occupancy of the land for a 5-year period. 43 U.S.C. § 270-3 (1970); 43 CFR 2561.0-5(a) and 2561.2. Ouzinkie Native Corp. v. Opheim, 83 IBLA 225 (1984) and cases cited. The applicants are required to establish the fact of use and occupancy according to the Allotment Act. The applicants thus bear the ultimate burden of proof in this case. They cannot, by virtue of the fact that this issue is urged in the course of an appeal from a denial of a protest against their claims, obtain a right to the allotments to which they have not shown they were entitled. The factual issue in each of these cases is whether the applicants have in fact each occupied and used the claimed allotment for 5 years as required by the Allotment Act.

The field examiner's reports do not support the applicants' claims. None of the field examiners found any evidence of claimed uses on any of the allotments. On the Davidson and Kohler parcels, clearing and woodcutting should have been evident. The parcels were not clearly marked on the ground. BLM was obliged therefore to locate all three parcels in the absence of the applicants. Pedro Bay argues the witness statements and supplemental affidavits the claimants submitted are not worthy of belief. While some witnesses report they have seen the three applicants on their allotments, the witnesses disagree with each other and with the applicants as to when the applicants used the land, both concerning commencement and season of use. Their statements are directly contradicted by information appearing in the field reports, in every case.

[3] The record on appeal indicates these three applicants may not have occupied and used the allotments in the manner required by statute. Clearly, no allotment may be approved without satisfactory proof of substantial actual possession and use of the land for five years which is at least potentially exclusive of others. The record as now constituted establishes the existence of a dispute concerning this central fact which cannot be resolved on the basis of the record. Because there exist disputed issues of material fact, the Native allotment applicants are entitled to a hearing at which they may produce evidence to establish entitlement to the allotment. See Donald Peters, 26 IBLA 235, 83 I.D. 309, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), approved, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). The field examination reports and affidavits appearing of record are inconclusive, and at any rate do not provide sufficient information or detail to afford due process in decision making in these cases. Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976).

Further, the record lacks an analysis by BLM which considers the effect of the conflicts in the record so as to support its decision to grant these allotments. See Katmailand Inc., 77 IBLA 347, 353 (1983). As we found in State of Alaska, supra at 202:

In light of the conflicting evidence and the failure of BLM to provide any analysis of the facts to support its adjudication in these cases, we are confronted with decisions which

are not sustained on the record. In light of this record, we must conclude that there is sufficient doubt as to the adequacy of the allotment applications to require a Government contest. See Katmailand Inc., supra.

It is concluded there is sufficient doubt concerning the adequacy of the allotment applications so as to require a Government contest to permit the development of an adequate factual basis for decision. State of Alaska, supra; Pedro Bay Corp., supra; see also Donald Peters, supra.

Therefore, the BLM decisions must be set aside and the cases remanded for initiation of a Government contest of the allotment applications. A copy of the contest complaint shall be served on the State of Alaska, in addition to appellant Pedro Bay and the applicants. Upon the filing of a proper motion, Pedro Bay and/or the State shall be allowed to intervene in the contest proceedings.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded to BLM for initiation of contests of the three disputed allotments.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

